IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

Deshone V. Herbin,

Defendant.

C.O.A. No.: 41944-1-II

STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW

I, Deshone V. Herbin, have received the opening brief prepaired by my attorney. Summarized below are the additional grounds for review that are not addressed in that brief. I understand the Court will review this Statement of Additional Grounds for Review when my appeal is considered on the merits.

ADDITION GROUND NUMBER ONE

At trial, the State presented no evidence that Oatfield, Aaron Ormrod, or Nick Ormrod had property stolen from their person. The Trial Court did not include the "or in the presence of another" language from WPIC 37.02 in its Defendant - specific "to convict" Robbery instructions, Which relieved the State it's burden to prove that either Herbin (or an accomplice) took property, "from the person" rather that "in the presence" of the named robbery victim. There was insufficient evidence to uphold Herbin's criminal convictions for robbery in the first degree in counts VI, VII and VIII, and their respective firearm enhancements.

FACTS IN SUPPORT OF GROUND ONE: Nicholas Oatfield was forced to crawl from a bedroom behind Nick and Aaron Ormrod to the dining room area. **VRP 02/23/2011, pg. 111.** After the assailants left the premises, cash in Oatfield's and Ormrod's respective wallets left in their respective bedrooms was discovered missing. **VRP 02/23/2011. pgs, 118, 194.** It was later determined that the television in Nicholas Ormrod's room, and his paintball gun from the living room was missing. **VRP 02/23/2011, pg. 203.**

ARGUMENT IN SUPPORT OF GROUND ONE: The State failed to prove the elements as stated in it's proposed instruction, that each victim had property taken from his person. Insufficient evidence

supports the three robbery convicts related to Oatfield and the Ormrod twins. This Court reversed the covictions of Herbin's two co-defendants on April 10th, 2012, State v. Burns, COA No. 41059-1-II, State v. Tillman, COA No. 41143-1-II combined, on the very same three counts of robbery. The facts are exactly the same and the jury instructions are exactly the same except the judge simply had the jury change the word "defendants" to "defendant", because they were reused from the previous trial that Tillman and Burns were convicted at which were the same this Court ruled upon were reverseable error. **VRP 02/24/2011, pg. 376.** The Court reviews jury instructions De Novo, "within the context of the jury instructions as a whole." State v. Jackman, 156 Wn.2d 736, 743, 132 P.3d 136 (2006). Jury instructions, "taken in their entirety, must inform the jury that the State bears the burden of proving every essential element of a criminal offense beyond a reasonable doubt." State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995), cert. denied, 518 U.S. 1026 (1996). "In criminal cases, the State assumes the burden of proving otherwise unnecessary elements of the offense when such added elements are included without objection in the 'to convict' instruction." State v. Hickman, 135 Wn.2d 97, 102, 954 P.2d 900 (1998). The pertinent facts are not in dispute. Regarding counts VI and VII, it was only after the assailants had left the residence that Nicholas Oatfield (Count VI) and Aaron Ormrod (Count VII)

discovered that cash in their respective wallets left in their respective bedrooms was missing. Similarly, the television in Nicholas Ormrod's bedroom was found missing after the assailants had exited the premises. The State conceded this scenario in it's closing argument and pointed out that out of the four robbery victims that only Zachery Dodge (Count V) "was present when his property was stolen." **VRP 02/24/2012, pg. 427.** In its "to convict" instructions for counts VI - VII, the court instructed the jury that to convict Herbin of these three respective counts of robbery in the first degree, it had to find that he "took personal property from the person of another...". None of these instructions included the optional phrase, "or in the presence of another." See WPIC 37.02 (first degree robbery instruction). RCW 9A.56.200(1), Washington's robbery statute clearly sets forth two ways to commit a taking of another's personal property. See RCW 9A.56.190. The statute thus defines robbery to include two alternatives; taking from a victim's person or taking property in a victim's presence. State v. Nam, 136 Wn.App. 698, 705, 150 P.3d 617 (2007). In Nam, the Court found that the terms "presence" and "person" in the robbery statute matters only when a party voluntarily elects to omit the presence language. Id. at 705-06. Consequently, where either of the means to commit the crime is omitted, the State assumes the burden of proving the elements as charged or instructed. Id. at 706. In that case, because the "presence" language was omitted, the State was required to prove

that the defendant unlawfully took personal property that was on or attached to another person. State v. O'Donnell, 142 Wn.App. 314, 324, 174 P.3d 1205 (2007). Because the robbery instructions omitted the phrase "or in the presence of another," the State bore the burden of proving that Herbin or an accomplice took property "from the person of" the victim. See State v. Hickman, 135 Wn.2d 97, 954 P.2d 900 (1998) (discussing well established "law of the case" rule). Under the law of the case doctrine, jury instructions not objected to become "the law of the case." Id. In a criminal trial, the doctrine requires that every element contained in the "to convict" instruction be proved by the State beyond a reasonable doubt. See State v. Ng, 110 Wn.2d 32, 39, 750 P.2d 632 (1998). "While personal property may be taken from the victim's presence without being taken from his person, it cannot be taken from his person without being taken in his presence." State v. Grant, 77 Wn.2d 47, 49-50, 459 P.2d 639 (1969). In Nam, where the State similarly omitted the "presence" language from the to-convict instruction for robbery in the first degree, this Court reversed because sufficient evidence, as here, did not support the jury verdict that Nam took personal property from the person of another. Nam, 136 Wn.App. at 707. Here, the State acquiesced to the court's instructions which required the State to prove that Herbin or an accomplice "took personal property from the person of another." As there was no evidence that this occurred in counts VI - VIII, these counts must be reversed.

ADDITIONAL GROUND NUMBER TWO

Cumulative errors prevented Herbin from being properly barred under RCW 10.43.050 of being tried a third time, that resulted in a manifest injustice of constitutional magnitude. Herbin was denied his right to a fair trial.

FACTS IN SUPPORT OF GROUND TWO: Herbin I, started March 31, 2010. On April 8th, 2010, all evidence had been before the jury and the State and the Defense both rested their case. **CP Minutes, pg. 17-18.** The Court read it's instuctions to the jury which did contain defective instruction on "unanimity", misleading the jury that their verdicts had to be found unanimously whether guilty or not guilty. Defense attorney Jim Shackleton was ineffective not objecting to these bad instructions misstating the law. It got worse as the jury, while deliberating sent out two questions that directly effected Herbin, "Can someone be an accomplice to the burglary without ever entering the residence?" **CP Minutes, pg. 20** and "What happens when all 12 jurors cannot come to a unanimous decision on one defendant?" **CP Minutes, pg. 20.** Herbin was not allowed to be present to object to this critical stage of trial, and holding the jury question deliberations in the judges private chambers denied Herbin a public trial and to have his counsel present. **CP Minutes, pg. 20.** On April 8, 2010, Public Defender stand-in, Patrick O'Conner, tried to respresent Herbin,

but had no clue of what had gone on in the case and did not raise any objection to the unanimity instruction or the jury being interupted in their deliberations by the Court improperly bringing out the jury to inquire, "if there was a reasonable probability of reaching a unanimous verdict, as to the one defendant?" **CP Minutes, pg. 20.** The jury, on April 13, 2010, was unable to reach a unanimous decision regarding all charges against Deshone Herbin. **CP Minutes, pg. 23.** Herbin II, started Novenber 1, 2010. On November 3rd, 2010, all evidence had been before the jury and the State and the Defense both rest their cases. **CP Minutes, pgs. 7-8.** The Court read it's instructions to the jury that again contained the exact same defective jury instructions on "unanimity", misleading the jury that their verdicts had to be found unanimously whether guilty or not guilty. Again, Defense attorney Jim Shackleton was ineffective for not knowing the law and rightly objecting to this axiomatic bad jury instructions misstating the law. On November 5th, 2010, The Bailiff addressed the Court at sidebar during the motion calendar. The Clerk assembled counsel and the Court advised that Mr. Lombardo was contacted by the jury. Herbin was not present at this critical stage of trial. The Bailiff, Mr. Lombard, placed on the record that he was contacted by the Presiding Juror at 11:45 and told that a juror had brought in two balaclavas. The Court held coloquy with counsel after the jury had been excused for the evening. The Defendant and the public were denied presence which again impeded a public trial. The offending juror was excused. **CP**

Minutes, pg. 9. An alternate juror was brought in and the jury told to start deliberating anew. **CP Minutes, pg. 9.** On November 5th, 2010, the jury continued to re-deliberate for two hours and sent out another question regarding "unanimity". Again, Herbin was not privy to this critical stage of the proceedings and could not lodge an objection. This jury question was discussed in the Judge's private chambers with only counsel present. The public and Herbin were not allowed access which denied a public trial. **CP Minutes, pg. 10.** The Court assembled the jury and inquired formally of each juror if they thought there was a reasonable probability of the jury reaching a verdict in a reasonable time. The Court after only two hours of deliberation declared a mistrial. **CP Minutes, pg. 11.** Herbin III, at a Status Hearing on January 19th, 2011, again Defense counsel Jim Shackleton was made unavailable and a fellow attorney from appointed counsel filled in named, Larry Jefferson. Defense counsel Jefferson told the Court, "He's gone through two hung juries throughout this matter, **VRP 01/19/2011, pg. 6.** Jefferson was ineffective for not knowing the case and doing any preparing to motion for a bar from further prosecution. Jefferson ineffectively made no objection due to his lack of being adequately prepared. The same bad "unanimity" instructions were used repeatedly at trial, "you must find the defendant is not guilty unless you conclude at the end of your deliberation that the evidence has established the defendant's guilt beyond a reasonable doubt." **VRP 02/22/2011, pg. 8.** Defense

counsel Jim Shackleton was on vacation weeks up to the start of trial and failed to object to the implications of double jeopardy at the start of Herbin III. Shackleton was ineffective in his preparation for trial and did not know the law.

ARGUMENT IN SUPPORT OF GROUND TWO: The cumulative error standard applies to this constitutional deprivation of a fair trial after six ways from sunday should of been an acquittal seven times over due to the errors stated in the facts that might have not been significant on there own, but when taken as a whole merit what is known as meeting the cumulative error standard. "We find that the trial court erred in four rulings. We must determine whether they were more probable than not harmless, or whether the error did not have "substantial influence" over the verdict. We conclude that the cumulative effect of the errors deprived the defendant of a fair trial." United States v. Tory, 52 F.3d 207 (9th Cir. 1995). Cumulative prejudice from counsel's deviancies may amount to finding ineffective assitance of counsel. Silva v. Woodford, 279 F.3d 825 (9th Cir. 2002). The Supreme Court has clearly established that the combined effect of multiple trial court errors violates due process where it renders the resulting criminal trial fundamentally unfair. Chambers v. Mississippi, 410 U.S. 284, 298, 302-03, 35 L.Ed.2d 297, 93 S.Ct. 1038 (1973). The combined effect of individual errors denied Chambers a trial in accord with traditional and fundamental standards of due process

and deprived Chambers of a fair trial. The cumulative effect of multiple errors can violate due process even where no single error rises to the level of a constitutional violation or would independantly warrant reversal. Chambers, 410 U.S. at 290 n.3. An accumulation of errors even though no one of them standing alone, would be sufficient gravity to constitute grounds for reversal. State v. Marks, 71 Wn.2d 295, 427 P.2d 1008 (1967); State v. Vadda, 63 Wn.2d 176, 358 P.2d 859 (1963). Cumulative error is a legitimate claim in this instance. State v. Perrett, 86 Wn.App. 312, 936 P.2d 426 (1997). This case is a violation of the Fifth Amendment to the United States Constitution. The United States Supreme Court ruled that the federal Double Jeopardy Clause is applicable to state and federal prosecutions. Benton v. Maryland, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969). Jeopardy attaches during a jury trial when a jury is empanelled. The jury only deliberating two hours and being prejudiced by being given wrong jury instructions created a mistrial from "manifest necessity", that Defense counsel was ineffective in not objecting to and demanding acquittal, or the the jury to be held to a less than all or nothing standard because if they would of been given correct "unanimity" instructions, who is to say which of the many counts they would of then acquitted or found Herbin hung. A retrial over an error caused manifest necessity should be a bar from further prosecution. Herbin's right to not be tried after acquittal has been violated by the previous trials and the many

manifest constitutional errors that are numerously apparent. Under both the state and federal constitutions, a defendant cannot be placed in jeopardy twice for the same crime. State v. Ahluwalia, 143 Wn.2d 527, 535-36, 22 P.3d 1254 (2001). The state and federal constitutions provide the same double jeopardy protections, and are interpreted identically. State v. Linton, 122 Wn.App. 73, 76, 93 P.3d 183 (2004), review granted, 153 Wn.2d 1017 (2005). Double jeopardy under either constitution protects the criminal accused against three possible events: 1) a second prosecution following acquittal; 2) a second prosecution following a conviction; and 3) multiple punishments for the same offense. North Carolina v. Pearce, 295 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969). But before double jeopardy can bar further prosecution in any case, three essential elements must be satisfied: 1) jeopardy has previously attached; 2) jeopardy has previously terminated; and 3) the defendant is again in jeopardy for the same offense in fact and law. State v. Corrado, 81 Wn.App. 640, 645, 915 P.2d 1121 (1996). As the Corrado court observed, "The first two elements define 'former' jeopardy, which is a prerequisite to 'double' jeopardy." Id. In Herbin's case, the second element - whether jeopardy has previously terminated - is at issue. Jeopardy attaches for purposes of the first element when a jury is sworn to hear the defendant's case. Corrado, 81 Wn.App. at 646. Thus, there is no dispute that jeopardy attached in Herbin I, Herbin II, or at Herbin III, as the jury was sworn

and heard all the evidence in it's entirety in all three trials. Jeopardy terminates for purposes of the second element of former jeopardy only if one of two possible requirements has been satisfied: 1) the defendant's conviction has become unconditionally final; or 2) the defendant has been expressively or impliedly acquitted of the charge in question. Corrado, 81 Wn.App. at 646-48. Impliedly Acquitted is what has happened here in Herbin I and Herbin II. The implied acquittal doctrine is an exception to the general rule that applies in some cases where the factfinder is given a full opportunity to consider more than one charge, but fails to render a verdict on one or more of those charges. State v. Wright, 131 Wn.App. 474 (2006). Three different ineffective attorneys not Knowing the law, none of them making a mandatory objection, and none of them prepaired was ineffectiveness. Herbin' not being allowed to be present at the most critical stages of Herbin I and Herbin II, denied him his right to object. Defense counsel's Collins, Jefferson and Shackleton all should have know the law regarding "unanimity", and the law regarding the right of the Defendant to be present at all critical stages of trial that was violated when they participated alone with the judge in chambers dealing with jury questions, and they should of known the law that a public has a right to open courtrooms and the public should of been a part of this process. All three lawyers were ineffective for not fighting for acquittal vs. allowing the jury to be hung. At the start of

Herbin III, motions and objections should have flew to bar any retrial. All three lawyers had no clue of the relevant statutes involved. The defense from the starting gate of Herbin III should of screamed bar under RCW 10.43.050, based on the facts raised in this ground. Failure to investigate this, and know the law was ineffective assistance. In re Pers. Restraint of Hubert, 138 Wn.App. 924 (2007). Herbin wanted to be at every critical stage of trial. Because he was not allowed to be there in Herbin I and Herbin II he was not able to object to the wrong "unanimity" instructions, or his right to have a public trial. Both of these denied rights played a major role in the jury being hung instead of acquitting Herbin. Herbin's abscence from both portion of Herbin I and Herbin II's jury question process in the Judge's private chambers violated his right to appear and defend "at every stage of the trial when his substantial rights may be affected." State v. Shutzler, 82 Wash. 365, 367, 144 P. 284 (1914). Herbin never waived his right to be present. Court's "must indulge every reasonable presumption against the loss of the constitutional right to be present at a critical stage of trial." Campbell v. Wood, 18 F.3d 662, 672 (9th Cir. 1994). There can be no knowing and intelligent waiver unless the defendant is aware of the right at issue. State v. Sargent, 111 Wn.2d 641, 655, 762 P.2d 1127 (1988). Herbin did not know of the questions being asked, or that he had a right to be present. "Unless the defendant is informed of his right, he cannot be presumed to know

it." State v. Duckett, 141 Wn.App. 797, 806-07, 173 P.3d 948 (2007) ("the court never advised Mr. Duckett of his public trial right or asked him to waive it. He certainly could not then make a knowing, intelligent and voluntary waiver of this constitutional right."). Valid waiver of right to be present requires "that the accused has not only a full knowledge of all facts and of his rights, but a full appreciation of the effects of his voluntary relinquishment." State v. Eden, 163 W.Va. 370, 256 S.E.2d 868, 873 (1979). Whether a defendant's constitutional right to be present has been violated is a question of law, subject to de novo review. State v. Strode, 167 Wn.2d 222, 225, 217 P.3d 310 (2009). Herbin's not being allowed to be present directly effected his right to object to the wrong "unanimity" instructions and the questions from the jury about them. This did have a major impact on whether they could of acquitted instead of being hung. This also dispells the bar to review that Herbin's very ineffective trio of counsel all failed to object to the very prevalent "unanimity" error, that this Court has held that a lawyer must raise in order to get review. This is a Due Process Clause of the Fourteenth Amendment. A criminal defendant has a fundemental right to be present at all critical stages of trial. Rushen v. Spain, 464 U.S. 114, 117, 104 S.Ct. 453, 78 L.Ed.2d 267 (1983). Petitioner's not being present to object or go over the jury's question is a violation of the right to be present under federal due process jurisprudence, United States Constitutional

Amendment Fourteen. In re Pers. Restraint of Benn, 134 Wn.2d 868, 920, 952 P.2d 116 (1998). A defendant has a right to be present at a proceeding "whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge." Snyder v. Massachusetts, 291 U.S. 97, 105-06, 54 S.Ct. 330, 78 L.Ed.2d 674 (1934)(overruled in part on other grounds sub nom. Malloy v. Hogan, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964)). An accused has a right to be present at all stages of the trial where his substantial rights might be affected. State v. Ward, 139 Wash. 196, 246 P.11, 19 (1926). The defendant has the right to be present at all critical stages. State v. Pruitt, 145 Wn.App. 784, 798 (2008). A defendant is guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure. Kentucky v. Stincer, 482 U.S. 730, 745, 1097 S.Ct. 2658, 96 L.Ed.2d 631 (1987). This also applies to the start of Herbin III when defense attorney Shackleton was on vacation and Herbin was not present to voice his objections. The confusing jury instructions did prevent the jury from acquitting in Herbin I and Herbin II. The jury asking questions related to accomplice liability and unanimity involving Herbin particularly, and his not being there to object to the Court's bad answers, did keep the jury from Acquitting. In Frantz v. Hazey, 533 F.3d 724 (9th Cir. 2008), the Ninth Circuit held similar to here, "Because of the delicate nature of such mid-

deliberation inquiries, we have a due process right to be present in conferences when juror's notes are discussed. United States v. Barragan-Devis, 133 F.3d 1287, 1289 (9th Cir. 1998), or "when a trial court prepares a supplemental instruction to be read to a deliberating jury", United States v. Rosales-Rodriguez, 289 F.3d 1106, 1110 (9th Cir. 2002). Presence is critical when a jury's questions are discussed because "[c]ounsel might object to the instruction or may suggest an alternative manner of stating the message," Id. at 1110 - a critical opportunity given the great weight that the jurors give a judge's words. The defendant's or the attorney's presence may also be an important opportunity "to try and persuade the judge to respond." Barragan-Devis, 133 F.3d at 1289. Artical I, Section 22, of the Washington Constitution provides an explicit guarantee of the right to be present. "Whether a defendant's constitutional right to be present has been violated is a question of subject to de novo review." State v. Irby, 170 Wn.2d 874, 246 P.3d 796 (2011). A hearing held in response to a jury question is an adversarial proceeding. A trial court has discretion whether to give further instructions to a jury after it has begun deliberations. State v. Ng, 110 Wn.2d 32, 42, 750 P.2d (1998). The jury in Herbin's first two trials had an inability to come to a unanimous verdict and was denied correct jury question answers on jury instructions that would of allowed them to acquit on all charges. The Washington State Supreme Court has commanded that a "hard look at each case" double jeopardy

standard wise. State v. Freeman, 153 Wn.2d 765. 108 P.3d 753 (2005). The cumulative effect of error does include Herbin's right to a public trial. The very foundation of this right is to ensure that integrity of our court process is fair. Not allowing Herbin or the public access to these crucial pivoting points did allow error to occur that could of been averted by Herbin, or any public spectator, commenting on "unanimity" by verbally pointing out any of the real, in the news, hot cases on that exact topic like Nunez, Bashaw, Goldberg and the "note on use of WPIC 30.03" that could of alerted the Defense lawyers to step up to the plate and start objecting, or, get it right. The public is an important part of this process that helps courts save money by adding it's voice and keeping the process running within the law. Even other lawyers and prosecutors that are duty bound officers of the court could of clarified, what those enclosed in private chambers, did not know, that the answer to the jury's questions in Herbin I and Herbin II were incorrect, and hence, the correct answers to these juror questions on jury instructions could of gave both jury's the answer they needed to acquit Herbin on all counts. The right to a public trial does apply in these circumstances and gives a credible amount of weight to the cumulative error requirement in this ground being appealed. Whether a defendant's constitutional right to a public trial has been violated is a question of law that this court reviews de novo. State v. Njonge, 161 Wn.App. 568 (2011). The Trial Court in both Herbin I and Herbin II failed to

The trial court in both HerbinI and Herbin II failed to hold any hearing to close the court room at the critical stage of trial. The Court Rule recognizes the right to openness. CrR 6.15(f), the court rule regarding answering jury questions, provides that when a jury asks a question during deliberations: "The court shall notify the parties of the contents of the questions and provide them an opportunity to comment upon an appropriate response. Written questions from the jury, the court's response and any objections thereto shall be made a part of the record. The court shall respond to all questions from a deliberating jury in open court or in writing." Of course, the court rule operates within the confines of the state and federal constitutional protections guaranteeing an open and public trial. The Constitution guarantees that a hearing in response to a jury question is part of the "public" trial. The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington State Constitution each guarantee a criminal defendant the right to a public trial. State v. Russell, 141 Wn.App. 733, 737-38, 172 P.3d 361 (2007). Additionally, article I, section 10 of the Washington Constitution states, "Justice in all cases shall be administered openly," which provides the public itself a right to open, accessible proceedings. Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 36, 640 P.2d 716 (1982). Article I, Section 10's guarantee of public access to proceeding and article I, section 22's public trial right together perform complementary, interdependent

funtions that assure the fairness of our judicial system, State v. Bone-Club, 128 Wn.2d 254, 259 906 P.2d 325 (1995); see also State v. Easterling, 157 Wn.2d 167, 187 (2006)("[T]he constitutional requirement that justice be administered openly is not just a right held by the defendant. It is a constitutional obligation of the courts."). Whether a defendant's public trial right applies in the context of an in-chambers conference to answer a question the jury submitted during its deliberations appears to be an issue of first impression in Washington. In State v. Sadler, 147 Wn.App. 97, 114, 193 P.3d 1108 (2008), this court recognized that the public trial right applies to evidentiary phases of the trial as well as other "adversary proceedings," including suppression hearings, during voir dire, and during the jury selection process. But this court also determined that "[a] defendant does not...have a right to a public hearing on pure ministerial or legal issues that do not require the resolution of disputed facts." Sadler, 147 Wn.App. at 114. Here, the trial court's in-chambers conferences addressed jury questions about culpability and unanimity, regarding the trial court's jury instructions. This is adversary proceedings. The central aim of the public trial guarantee is to ensure that a defendant is treated fairly by allowing the public to observe the defendant's treatment first-hand. "The requirement of a public trial is for the benefit of the accused; that the public may see

he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions." In re Oliver, 333 U.S. 257, 270,n.25, 68 S.Ct. 499, 506, n.25, 92 L.Ed. 682 (1948), quoting T. Cooley, Constitutional Limitations 647 (8th ed. 1927). Accord, Estes v. Texas, 381 U.S. 532, 588, 85 S.Ct. 1628, 1662, 14 L.Ed.2d 543 (1965)("Essentially, the public-trial guarantee embodies a view of human nature, true as a general rule, that judges, lawyers, witnesses, and jurors will perform their respective functions more responsibly in an open court than in secret proceedings"). At least six societal interests are advanced by open court proceedings, namely; promotion of informed discussion of governmental affairs by providing the public with more complete understanding of the judicial system; promotion of the public perception of fairness which can be achieved only by permitting full public view of the proceedings; providing a significant community therapeutic value as an outlet for community concern, hostility and emotion; serving as a check on corrupt practices by exposing the judicial process to public scrutiny; enhancement of the performance of all involved; and discouragement of perjury. The interests underpinning the public trial right embrace both the testimony of witnesses and the arguments of the parties and the wisdom of the judge in resolving legal issues. The legal acumen of the judge was an issue in this case, because he got it

wrong on both trials. Fairness was not a part of Herbin's three trials as the jury's were instructed terribly, and incorrectly. A judge's answer to a jury question, as well as the positions taken by the respective parties, obviously implicates issues of trial fairness. While some questions may be routine, others may implicate significant fairness issues, either by the court or by the jury. This part of trial should not be excluded from the other portions of trial that are open and public. it is for these exact reasons that the public trial right applies to the evidentiary phase of the trial, and to other "adversary proceedings." Ayala v. Speckard, 131 F.3d 62, 69 (2d Cir. 1997). A hearing held in response to a jury question is an adversarial proceeding. Because there are sometimes several potential responses to jurors' questions, the hearing on this issue is often adversarial and should be considered part of the trial. The United States Supreme Court has made clear that when faced with an inquiry from the deliberating jury, "the jury's message should [be] answered in open court and...[defendant's counsel should [be] given opportunity to be heard before the trial judge respond[s]." Rogers v. United States, 422 U.S. 35, 39, 95 S.Ct. 2091, 2094-95, 45 L.Ed2d 1 (1975). The Court of Appeals decision in State v. Rivera, 108 Wn.App. 645. 652, 32 P.3d 292 (2001), provides a useful contrast to the case at bar by providing an example of a situation which does not implicate the right to an open and public trial. In Rivera, the Court of Appeals concluded

that a question regarding the order in which jurors were seated (due to a hygiene issue) "was a ministerial matter, not an adversarial proceeding. It did not involve any consideration of evidence, or any issue related to the trial." Id. at 653. Herbin agree with the "ministerial vs. adversarial" distinction. However, answering a jury question can hardly be characterized as a "ministerial matter." To the contrary, it is certainly an adversarial proceeding (both in theory and often in practice). The Washington State Supreme Court reiterated in State v. Strode, 167 Wn.2d 222, 217 P.3d 310, 316 (2009): Some courts in other jurisdictions have held that there may be circumstances where the closure of a trial is too trivial to implicate one's constitutional right. United States v. Ivester, 316 F.3d 955 (9th Cir. 2003). Trivial closures have been defined to be those that are brief and inadvertent. United States v. Al-Smadi, 15 F.3d 153, 154-55 (10th Cir. 1994); Snyder v. Coiner, 510 F.2d 224, 230 (4th Cir. 1975). This court, however, "has never found a public trial right violation to be [trivial or] de minimis." Easterling, 157 Wn.2d at 180, 137 P.3d 825. Strode did not change that result. Instead, Strode reaffirmed that this error was structural - mandating reversal without a particularized showing of prejudice. Strode, supra. ("By conducting a portion of the trial (jury voir dire) in chambers without first weighing the factors that must be considered prior to closure, prejudice to Strode is presumed. This error cannot be considered harmless and,

therefore, Strode's convictions are reversed, and the case is remanded for new trial."). Protection to the right to public trial requires a trial court "to resist a closure motion except under the most unusual circumstances." Bone-Club, 128 Wn.2d at 259. A trial court may close a courtroom only after considering the five requirements enumerated in Bone-Club and entering specific findings on the record to justify the closure order. Bone-Club, 128 Wn.2d at 258-59. The remedy for such a violation is to reverse and remand for a new trial. In re Pers. Restraint of Orange, 152 Wn.2d 795, 814, 100 P.3d 291 (2004). In this case, the trial court did not "resist" closure, but instead apparently never considered Herbin's and the public's right to an open and public trial (as well as Herbin's right to be present at a hearing conducted in any three of the trials). As a result, no portion of a Bone-Club hearing took place in this case during Herbin I, Herbin II, or in Herbin III. The trial court erred by closing the courtroom for this hearing. This error mandates reversal, and weighs heavily toward the cumulative effect towards this ground. The United States Supreme Court held in Presley v. Georgia, 130 S.Ct. 721 (2010): This court's rulings with respect to the public trial right rest upon two different provisions of the Bill of Rights, both Applicable to the states via the Due Process Clause of the Fourteenth Amendment. The Sixth Amendment directs, in relevant part, that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public

trial..." The court in In re Oliver, 333 U.S. 257, 273, 68 S.Ct. 499, 92 L.Ed. 682 (1948), made it clear this right extends to the states. Two of the jury instructions the jury questioned are each error in themselves by how the trial court answered and denied Herbin a fair trial. The question from the jury on accomplice liability dealt directly with culpability and the jury was not able to get an instruction they could understand an a hung jury resulted. The jury wanted to know if Herbin was still guilty if he was outside the house. The Trial Court failed to correct an ambiguity in the Accomplice Liability instruction where the jury indicated that the instruction given was susceptable of two constructions dealing with culpability and actual knowledge. The instructions misstated the law and significantly lowered the State's burden of proof. A trial court abuses its discretion when its decision is manifestly unreasonable, rests on untenable grounds, or is made for untenable reasons. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). In Herbin's case, the jury reasonably concluded that the instruction defining accomplice liability was ambiguous. The language of the Washington pattern jury instruction 10.51 and its explanation that "mere Presence" is not enough to find accomplice liability satisfies what we formerly referred to as an "overt act" requirement. 11 Washington Practice: Washington Pattern jury Instructions: Criminal 10.51, at 217 (3d ed. 2008). This is the correct answer that the trial court should of replied with. The

Accomplice Liability mental element and knowledge specificity was not met by the answer given to the jury's question. The knowledge factor is required to convict and specific. State v. Trout, 125 Wn.App. 403, 105 P.3d 69 (2005). Presence at the scene, even coupled with assent, is not sufficient to support complicity. State v. Luna, 71 Wn.App. 755, 759 (1993). The question the jury asked hinged on whether Herbin could be a participant in the crimes, even if he was outside of the house when the crimes happened inside of the house. Actual participation in the crime is required. State v. Everybodytalksabout, 145 Wn.2d 456 (2002). Using accomplice liability to corral Herbin into being found guilty, the state did not prove that Herbin, as an accomplice, to the crime of first degree burglary particularly, was aware that the principles were armed, it is not first degree burglary. State v. Bockman, 37 Wn.App. 474 (1984). Washington's law of Accomplice Liability requires the State to prove that the purported Accomplice shared the criminal intent of the primary actor. Accomplice liability is not strict liability. Instead, RCW 9A.08.020(3)(a) "requires the accomplice to have the purpose to promote or facilitate the particular conduct that forms the basis for the charge...[The accomplice] will not be liable for for conduct that does not fall within this purpose." State v. Roberts, 142 Wn.2d 471, 510-11, 14 P.3d 713 (2000). "The legislature, therefore, intended the culpability of an accomplice not extend beyond the crimes of which the accomplice has

'knowledge', the mens rea of RCW 9A.08.020." Id. at 511. The trial court's answer to this question about Herbin being outside, and accomplice liability relieved the State of its burden of proving premeditation beyond a reasonable doubt. The jury with the correct answer would of acquitted Herbin instead of remaining undecided and hung. The purpose of jury instructions is to provide the jury with the applicable law. State v. Borrero, 147 Wn.2d 353, 362, 58 P.3d 245 (2002). A trial court has considerable discretion in formulating jury instructions. State v. Rehak, 67 Wn.App. 157, 165, 834 P.2d 641 (1992). Constitutionally sufficient jury instructions must be readily understood and not misleading to the ordinary mind. State v. Dana, 73 Wn.2d 533, 537, 439 P.2d 409 (1968); State v. Alexander, 7 Wn.App. 329, 336, 499 P.2d 263 (1972). A trial court must fully and accurately instruct a jury on the law of accomplice liability. Roberts, 142 Wn.2d at 513. If the jury could have been confused and reached its decision based on an incorrect understanding of the law, this possibility taints the verdict. State v. Carter, 154 Wn.2d 71, 84-85, 109 P.3d 823 (2005). Where a defective jury instruction lowers the State's burden of proof, it constitutes a structural error and reversal is required. Sullivan v. Louisiana, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993). When assessing the impact of an instructional error, reversal is automatic unless the error "is trivial, or formal, or merely academic, and was not prejudicial to the party assigning

it, and in no way affected the final outcome of the case." State v. Townsend, 142 Wn.2d 383, 348, 15 P.3d 145 (2001)(quoting State v. Golladay, 78 Wn.2d 121, 139, 470 P.2d 191 (1970), overruled on other grounds by State v. Arndt, 87 Wn.2d 374, 553 P.2d 1320 (1976)(quoting State v. Britton, 27 Wn.2d 336, 341, 178 P.2d 341 (1947)). The "unanimity" instruction error is so obvious that no more is needed except to lock it in. Failing to object to instructions creating double jeopardy still preserves the constitutional issue for appeal as it is a manifest constitutional error. State v. Kassahun, 78 Wn.App. 938, 900 P.2d 1109 (1995). The cumulative error doctrine applies here as the cumulative trial error reasonably material affected the outcome of the case. State v. Johnson, 90 Wn.App. 54 (1998).

ADDITIONAL GROUND NUMBER THREE

The Sentencing Court ordered that Herbin be given mental health treatment as part of his sentence. The Sentencing Court acted beyond it's capacity because it found factually that Herbin needed this treatment, when no facts were presented that deemed any problem with herbin's mental health, and no mental health evaluation was performed to determine treatment was needed.

FACTS IN SUPPORT OF GROUND THREE: On March 24, 2011, the honorable Paula Casey held sentencing. The State recommended that a mental health evaluation would be appropriate. **VRP 03/24/2011, pg. 50.** Defense attorney Shackleton stated, "I have no objection to a medical examination." **VRP 03/24/2011, pg. 53.** The Sentencing Court ordered, "The defendant shall undergo evaluation and fully comply with all recommended treatment for the following: [X] Mental Health. **Felony Judgement and Sentence, pg. 7.**

ARGUMENT IN SUPPORT OF GROUND THREE: Treatment is a sentence and as such, has to merit a proper finding of fact. Due process forbids use of presumption that relieves the prosecution of burden of proving mental state by inference of intent from an act. Sandstrom v. Montana, 442 U.S. 510, 514-24 (1979). The State established no threshold of proof that treatment was deemed to merit being included in Herbin's sentence. The Sentencing Court made no finding of fact to substantiate this in open court. By placing sentence elevating fact finding within the judge's province, violates a defendant's right to trial by jury safeguarded by the Sixth and Fourteenth Amendments. Cunningham v. California, 549 U.S. 270, 281, 127 S.Ct. 856, 166 L.Ed.2d 856 (2007).

ADDITIONAL GROUND NUMBER FOUR

The verdict in Counts II and III, were rendered upon insufficient evidence as the "robbery specific" element was not met with Nicholas Oatfield, and the Ormrod twins, not having been robbed. All three counts of kidnap were also returned of an improper verdict as all three counts are incidental to the robberies under the finding in State v. Korum, 120 Wn.App. 686, 707 (2004), re-affirmed, In re Pers. Restraint of Bybee, 142 Wn.App. 267 (2008); State v. Elmore, 154 Wn.App. 885 (2010).

FACTS IN SUPPORT OF GROUND FOUR: As cited to previously in Ground One, this Court has found in Herbin's co-defendant's combined appeals, that the three counts of robbery in Counts VI, VII and VIII did not constitute robbery because of the "presence" element. Herbin contends that if no robbery transpired in those counts, then the element required in jury instructions for the crime of kidnapping in the first degree in the "commission of a robbery" for Malcolm Moore, **VRP 02/24/2011, pg. 405,** Casey Robert Jones, **VRP 02/24/2011, pg. 406,** The State in closing summed it up best by saying thatMalcolm Moore and Casey Jones for example at the front door, and Brittany Burgess for that matter in the back bedroom. **VRP 02/24/2011, Pg. 426.** The three robberies no longer valid, are site specific and were in the front bedrooms which

the victims crawled through the same front room as Moore and Jones. Nicholas Oatfield testified, "It was Nick and then me and then Aaron crawling from where our bedrooms were in the -- like that area because there's kind of like three bedrooms closer. So we were crawling from that area, and when we got in there, Malcolm and Casey were in there. **VRP 02/23/2011, pg. 111.** Regarding all three kidnappings and the elements being incidental to robbery, the defense did object to these particular kidnapping instructions by making a motion to dismiss. "The defendant moves to dismiss the kidnapping charges, counts two, three and four. The basis for the same in that is the defense asserts that the kidnappings, if believed to be true and in the light most favorable to the state, were incidental to the robbery." **VRP 02/24/2011, pg. 370.** The trial court denied the motion. **VRP 02/24/2011, pg. 372.**

ARGUMENT IN SUPPORT OF GROUND FOUR: The jury instructions for each count of kidnapping was very element exacting that the kidnapping had to be with intent to facilitate commission of a "robbery" or flight thereafter. The three robberies attributed at trial to the kidnapping of both Moore and Jones, were the robberies of Oatfield, and the Ormrod twin brothers. This is because it was very site specific and their paths crossed the same front room. The rules of where and when that determine

separate crimes comes into play here. The robberies used by Prosecutor Bruneau to present evidence was brought before the jury as only Oatfield and the Ormrod twins. Prosecutor Bruneau used the Zachery Dodge robbery in the far back bedroom for the element in Count IV, and the kidnapping of Brittany Burgess who was with Dodge in his bedroom and moved to facilitate the robbery of Dodge and site specific. All the kidnapping jury instructions should of been dismissed by the judge when Shackleton correctly cited Korem. Jake Korum is now free and in Tacoma selling cars at one of his father's dealerships because this Court found, the kidnappings incidental to the robberies because (1) the restraint used was for the sole purpose of facilitating the robberies (2) forcible restraint is inherent in armed robberies (3) the restrained victims were not moved away from there homes (4) the duration of the restraint was not substantially longer than the commission of the robberies and (5) the restraint did not create danger independant of the danger posed by the armed robberies themselves. For these five reasons Herbin's kidnapping convictions should be overturned and the corresponding firearm enhancements that were rendered for them. Legal error in jury instructions could have misled the jury is a question of law, which we review de novo. Hue v. Farmboy Spray Co., 127 Wn.2d 67 (1985); Stevens v. Gordon, 118 Wn.App. 43 (2003). A jury instruction error is of constitutional magnitude where it results in the ommission of an element of the offense. State v. Byrd, 72

Wn.App. 774. 868 P.2d 158 (1994), aff'd, 125 Wn.2d 707, 887 P.2d 396 (1995).

ADDITIONAL GROUND NUMBER FIVE

Herbin's sentence for the eight gun enhancements was disproportionate to the exact same sentences his co-defendants recieved for the same conduct. Herbin got forty years for the gun enhancements, his co-defendants recieved five years for the same eight gun enhancements. Herbin was not charged as a principle in the accomplice liability and it is clear that he did not receive equal protection under the law. The trial court's mistaken belief that an exceptional sentence below was not available to Herbin, was error.

Facts in support of Ground Five: On March 24, 2011, defense attorney Shackleton requested the same exceptional sentence below the standard range based on RCW 9.94A.535(1)(g), and made the Court aware that the co-defendants all had Nine-plus point scores, received the sentence asked for for exactly the same behavior. **VRP 03/24/2011, pg. 51.** The State said the eight firearm enhancements were manditory and had to be run consecutive. **VRP 03/24/2011, PG. 49.** The Court agreed.

Thurston Counnty Superior Court Judge Strophy imposed eight firearm inhancements into one five year sentence for the principles in this case. **VRP 03/24/2011, pg. 58.** Herbin, who was the accomplice, convicted only on accomplice liability, received forty years for the exact same enhancements. Thurston County Superior Court Judge Paula Casey expressed, "I am somewhat concerned about what the weapon enhancements do in this particular instance and whether they are appropriate, but I think the law does require me to impose them in the case of all eight crimes. So the 60-month weapons enhancement will be imposed for each of the eight crimes." **VRP 03/24/2011, pg. 47.** This was ran consecutive to the other multiple sentences. One of the biggest things to point out is that due to the flat time of the firearm enhancements being consective to the other crimes inwhich no one died. Herbin has a longer sentence release date wise than David Rice who slew a family of four in Seattle, David Anderson who slew a family of four in Bellevue, and the vast Majority of Life Without Parole Third Strikers that have all been issued release dates that encompassed way more murder and mayhem. No one was hurt in all the crimes in this case, yet Herbin has more time than the majority of murders in the Washington State Penitentiary where he is housed among them. Herbin did not get the lighter sentences his co-defendant duly received even though the were convicted under the majority of evidence as being the ones who

were directly responsible for the robberies and kidnappings, not Herbin. The disparity in culpability is on the ratio or a million to one, and Herbin sure got the short end of the stick. Judge Casey did hold it against Herbin that the jury was hung two previous trials. The one trial found the evidence so non-existant that they sent out the jury question asking if someone that was outside could be held responsible, and did not convict. Judge Casey commented on Herbin's right to remain silent and noted for the record that Herbin expressed no remorse. **VRP 03/24/2011, pg. 57.** Herbin maintains his innocence and appeals. Judge Strophy did it, that alone should of been a huge indicator that the exceptional sentence could be done as veteran judges do not go beyond their jurisdiction and authority bestowed them on something this serious. Departures from the guidelines, **RCW 9.94A.535(g)** reads, The operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly excessive in light of the purpose of this chapter, as expressed in RCW 9.94A.010. Shackleton was ineffective in his assistance of counsel for not investigating exactly how Judge Strophy legally did it, and the Court also should of took a "time out", to look up what she was not sure especially when the sentence she gave Herbin will have him doing more time than Rice, Anderson and the majority of LWOP's. Under the Washington State Court Rules, RPC, Title 1, Legal Knowledge and Skill, [1] the preparation and study... and [5] analysis and legal elements of

the problem..., all those involved should of either known the law or looked it up. Herbin does qualify for equal protection to have the same sentence on the gun enhancements as his co- defendants. State v. Cafe, 117 Wn.App. 470 (2002). The Sentencing Court's mistaken belief that an exceptional sentence is not available is grounds for granting relief. In re Pers. Restraint of Mulholland, 161 Wn.2d 322 (2007). Herbin's Eight Amendment right was violated because his sentence was disproportionate to his co-defendant's sentence for the same conduct. Solem v. Helm, 483 U.S. 277 (1983).

ADDITIONAL GROUND NUMBER SIX

Herbin was denied his Sixth Amendment right to a fair and impartial jury. A juror gave false answers during voir dire that materially effected the outcome of the trial.

FACTS IN SUPPORT OF GROUND SIX: The Court swore in the jury, "Do each of you solemnly swear or affirm that you will truthfully answer questions about your qualifications to be jurors in this case whether the questions are asked by the judge or by the attorney? If so, please say, "I do." The entire jury responded that they did. **VRP 02/22/2011, pg. 9.** The Court further

admonished the jury, "You shouldn't withhold information in order to be seated on this jury." **VRP 02/22/2011, pg. 10.** Prosecutor Bruneau asked the jury if they Knew the names of any witnesses in the case and named them all. **VRP 02/22/2011, pg. 12.** Juror Daniel Bryan admitted that he knew only Malcolm Moore, a student he had eight years prior. He said he thought he could remain fair and impartial. **VRP 02/2202011, pg. 14.** Later Juror Byran admit he knows the Defendant's father. He said he didn't "think so" to the Court's inquirey if it would effect his being impartial, because, "we're not close." **VRP 02/22/2011.** It was obvious that Bryan could not tolerate John Lee Herbin because he was black, and Bryan was very white and proud of it. At mid trial, Daniel Bryan discloses that he also knows the Ormrod twins who he taught and continued to socialize with in recent years. **VRP 02/23/2011, pg. 209-10.** The defense did try to get the Court to dismiss Bryan for cause, but was denied. The Court verbally abused Defense counsel Shackleton for asking Bryan questions when this discovery was brought forth and cowtoed counsel into not objecting.

ARGUMENT IN SUPPORT OF GROUND SIX: The Ormrod twins stand out like a sore thumb. The own the local Paint-Ball store that Juror Byran admitted going to and as a teacher you do not forget the names of hyperactive twins that you taught, socialized with after

they graduated and kept tabs on. After two hung jury's, Byran wanted to help his friends send Herbin to prison. Byran remained silent, played the "I can be impartial" game, and manipulated his way onto the jury. These convictions must be overturned because Byran made intentionally false and misleading statements during voir dire. Irwin v. Dowd, 366 U.S. 717 (1961). This is juror misconduct warranting a new trial. United States v. Martinez-Salazar, 120 S.Ct. 774 (2000).

ADDITIONAL GROUND NUMBER SEVEN

Post appellate counsel denied Herbin, an indegent, access to a free transcipt on appeal, the State's Power-Point presentation which contains highly inflamitory evidence of blatent prosecutor misconduct that denied Herbin a fair trial.

FACTS IN SUPPORT OF GROUND SEVEN: Herbin verbally and corresponded in writing that the power point presentation contained doctored pictures of him with the word "guilty" stamped on his forehead. His Attorney lis Tabbut said she would get him the power point but never did. The prejudice of evidence

published to the jury and not made part of the admitted exhibits of this nature denied Herbin a fair trial and decency. This was Prosecutor Bruneau's forte to win cases as he pulled the same stunt repeatedly in the Maddus, Moore, Sublett and dozens more trials that he cheated on. **Please note attached EXHIBITS.**

ARGUMENT IN SUPPORT OF GROUND SEVEN: Herbin was denied his access to courts and his right to raise this ground on direct appeal. An indegent has a right to a free transcript of the proceedings to effect appeal. Griffin v. Illinois, 351 U.S. 12 (1956).

ADDITIONAL GROUND NUMBER EIGHT

The cumulative effect of ineffective assistance of counsel denied Herbin a fair trial.

FACTS IN SUPPORT OF GROUND EIGHT: All of the half dozen previous stated acts of ineffective assistance of counsel in this brief, and the biggest fact that Shackleton did not call John Lee Herbin the alibi witness that testified previously and won the jury in the past trial, and was available but did not get called. **VRP 02/22/2011, pg. 14.**

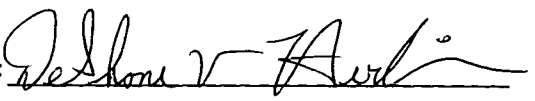
ARGUMENT IN SUPPORT OF GROUND EIGHT: Failure to call alibi witnesses is harmful error. Lord v. Wood, 184 F.3d 1083 (9th Cir 1999); Brown v. Myers, 137 F.3d 1154 (9th Cir. 1998). The same cumulative effect discussed earlier applies here.

ADDITIONAL GROUND NUMBER NINE

The prosecutor committed cumulative prosecutor misconduct.

FACTS IN SUPPORT OF GROUND NINE: All of the afore mentioned acts of prosecutor misconduct, including the misuse of the Power Point photos not admitted into evidence. The State repeatedly infered that Ashley Perreira-Herbin married the Defendant for the sole purpose of this trial, "when push come to shove and he really depended on you." Bruneau repeatedly called her a liar and said she would say anything for her husband, telling the jury not to believe her. **VRP 02/24/2011, pgs. 387, 388, 446.**

ARGUMENT IN SUPPORT OF GROUND NINE: The State committed flagrant acts of prosecutor misconduct. Throughout the entire trial the prosecutor vouched for witness credibility and that Herbin's witnesses were liars. The misconduct in the Power Point and sneaking in highly inflamatory evidence has become a trademark of this particular prosecutor. The cumulative effect is apparent and merits a new trial. State v. Walker, 164 Wn.App. 724 (2011).

DATED: April 20, 2011. SIGNED: 

Deshone Herbin #348158
W.S.P., 1313 N. 13th Ave.
Walla Walla, Wa. 99362

EXHIBIT

A

(Letter From Lisa Tabbut, Dated 12-12-11)

LISA E. TABBUT

ATTORNEY AT LAW

December 12, 2011

Deshone V. Herbin/DOC#348158
Washington State Penitentiary
1313 N. 13th Avenue
Walla Walla, WA 99362

CONFIDENTIAL/LEGAL MAIL

RE: State of Washington, Respondent, v. Deshone V. Herbin, Appellant
Court of Appeals No. 41944-1-II
Thurston County No. 09-1-01928-6

Mr. Herbin:

I am working on your request to get the PowerPoint presentation. It is possible that Mr. Shackleton has a copy. Alternatively, he may be able to get a copy from the prosecutor's office. I will let you know when I hear anything.

It took the Court of Appeals a long time to rule on our request to have the second trial transcribed. But they did and granted the request. The transcription of the second trial is due b January 12, 2012. The Appellant's Brief is due 30 days after that.

I will schedule a phone call with you once I get the transcript for the second trial. I will also send you a copy of the second trial transcript once I get it.

Sincerely,

Lisa E. Tabbut
Attorney at Law

P.O. Box 1396 • Longview, Washington 98632 • Phone: (360) 425-8155 • Fax: (360) 425-9011

EXHIBIT

B

(Letter From Lisa Tabbut, Dated 01-10-12)

LISA E. TABBUT

ATTORNEY AT LAW

January 10, 2012

Deshone V. Herbin/DOC#348158
Washington State Penitentiary
1313 N. 13th Avenue
Walla Walla, WA 99362

CONFIDENTIAL/LEGAL MAIL

RE: State of Washington, Respondent, v. Deshone V. Herbin, Appellant
Court of Appeals No. 41944-1-II
Thurston County No. 09-1-01928-6

Mr. Herbin:

I just got your voice me. I see that you called at 2:22. Sorry the guards would not let you out to call me as scheduled at 1:30.

Mr. Shackleton has never responded to my inquiries about the status of the PowerPoint. I contacted the prosecutor's office hoping they would file the PowerPoint as they had been ordered to so in the Maddaus case. They told me they would not do so and I would have to file a motion with the Court of Appeals., I will do so. Also, I have been in contact with Mr. Maddaus' attorney, Jodi Backlund. She gave me an update on his case as it relates to the PowerPoint.

I am preparing to file your brief on January 17. I will not have the PowerPoint by that date. However, I hope to have it soon and possibly soon enough for you to respond to it in your Statement of Additional Grounds for Review. If I feel that there are any legal issues with the PowerPoint, I can always file a supplemental brief wit the Court of Appeals.

I will send you a date and time to call me when I send you your copy of the Brief of Appellant on January 17.

Sincerely,

Lisa E. Tabbut
Attorney at Law

P.O. Box 1396 • Longview, Washington 98632 • Phone: (360) 425-8155 • Fax: (360) 425-9011

EXHIBIT

C

(Page No. 2 Of A Letter, Dated 02-05-12,)
(From Mr. Herbin To Lisa Tabbut)

In re Pers. Restrain of Lavery, 154 Wn.2d 249, 111 P.3d 837 (2005). The same kind of analysis and correction that happened in Lavery applies here. Because Freeburg effectively corrected the error of the Mutch analysis, it represented a material change in the law. The same applies here as Bashaw changed the way Goldberg did business, and the Supreme Court changed the "Note of use" on the WPIC to make sure that never happens again in Washington State. Bashaw corrected the error of the Goldberg analysis, and as such, Bashaw represents a material change in the law. This is proven even more conclusive by the Washington State Supreme Court's changing the "Note of use" of 11 Wash. Prac. Pattern Jury Instr. Crim. WPIC 30.30. The law has completely changed and it is so written, now. Appellate attorney David Zuckerman, came up with this brilliant catch that now brings our State Due Process to what it should be with the commading "Note on use." The test for determining whether a new law represents a significant, material change is applied by asking if the defendant could have argued the same issue before the new law was decided. State v. Olivera-Avila, 89 Wn.App. 313, 321, 949 P.2d 824 (1997)(quoting In re Pers. Restraint of Holmes, 121 Wn.2d 327, 332, 849 P.2d 1221 (1993)).

Also I would like you to add the above highlighted argument to the Bashaw ground you did a good job raising. Because it did change the way the law has to be now used, "Note on use, WPIC 30.30", it is in that respect something we can take all the way to the U.S. Supreme Court and get sent back victorious on. I know others are making sure this issue is raised so they can federalize their fight, and I too want to be on that bandwagon.

Please let me know about the missing record and whether or not we both get extensions. Thank you for yor help and down to earth opinions.

Respectfully your client,

EXHIBIT

D

(Letter To Lisa Tabbut, Dated 03-31-12)

March 31, 2012

Lisa E. Tabbut,
Attorney at Law
P.O. Box 1396
Longview, WA 98632

Re: State v. Herbin, Court of Appeals No.41944-1-II;
Thurston County Superior Court Cause No.09-1-01928-6.

Dear Ms. Tabbut:

I am writing you in regards to the Power Point presentation that was used during my case.

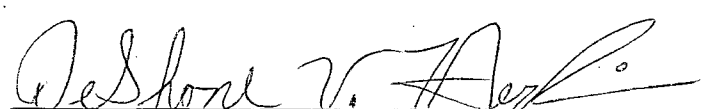
In your letter, dated 12-12-11, you stated that you were working on my request to get the Power Point presentation; and in your letter, dated 01-10-12, you stated that you were filing a motion to get the Power Point presentation made a part of the record for appellate review.

Have you filed the motion to get the motion to get the Power Point presentation made part of the record for review, as you said you would? If not, would you please do it right away. As soon as you have a copy of the Power Point slides, would you please provide them to me. I need a copy of the Power Point slides in order for me to complete my Statement of Additional Grounds, and I have been waiting for you to send them to me.

My deadline, to submit my Statement of Additional Grounds, is quickly approaching. So your timely response would be greatly appreciated.

Thank you, for your time and assistance in this matter. I look forward to your timely, formal response.

Sincerely,



Deshone V. Herbin, #348158
Washington State Penitentiary
1313 N. 13th Ave.
Walla Walla, WA 99362

cc: My File

State v. Herbin

NO. COA No. 41944-1-II

AFFIDAVIT OF SERVICE BY MAILING

I, Deshone Herbin, being first sworn upon oath, do hereby certify that I have served the following documents:

STATEMENT OF ADDITIONAL GROUNDS

Upon: Thurston County Prosecutor
2000 Lakeridge Drive S.W., Olympia, Wa. 98502

Lisa Tabbut, Attorney
P.O. Box 1396, Longview, Wa. 98632

FILED
COURT OF APPEALS
DIVISION II
12 APR 25 PM 12: 20
STATE OF WASHINGTON
BY _____
DEPUTY

By placing same in the United States mail at:

In compliance with GR 3.1
WASHINGTON STATE PENITENTIARY
1313 NORTH 13TH AVENUE
WALLA WALLA, WA. 99362

On this 20th day of April, 2012.

Deshone V Herbin
Name & Number
Deshone Herbin # 348158

Affidavit pursuant to 28 U.S.C. 1746, Dickerson v. Wainwright 626 F.2d 1184 (1980); Affidavit sworn as true and correct under penalty of perjury and has full force of law and does not have to be verified by Notary Public.